91-1893

No. _____

Supreme Court, U.S.
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In the
Supreme Court of the United States
October Term, 1991

POLARIS INDUSTRIES PARTNERS L.P.,
a limited partnership,
POLARIS INDUSTRIES L.P., a limited partnership,
POLARIS INDUSTRIES ASSOCIATES L.P.,
a limited partnership, and
POLARIS INDUSTRIES CAPITAL CORPORATION,
a Delaware corporation,

Petitioners,

v.

WESTERN POWER SPORTS, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This petition presents the following questions:

I. Whether a court in an antitrust tying case must consider uncontroverted evidence of reasonable substitutes in determining whether a plaintiff's theory of a relevant tying product market should be rejected as a matter of law.

II. Whether a non-moving party, in responding to a motion for summary judgment on an antitrust tying claim, should be required to submit evidence supporting a finding that the tying arrangement resulted in an actual adverse effect on competition or had a substantial potential for impact on competition.

LIST OF PARTIES AND RULE 29.1 LIST

The caption of the petition identifies all parties in the court below. Petitioners (hereinafter collectively "Petitioners" or "Polaris") identify below the known affiliates or other entities with an interest in one or more of the Petitioners listed in the caption:

EIP Associates L.P. - General Partner of Polaris Industries L.P.;

Victor K. Atkins, Jr. - General Partner of Polaris Industries Associates L.P., and General Partner of EIP Associates L.P.;

Hutton EIP L.P. - Limited Partner in EIP Associates L.P.;

EIP Capital Corporation - Managing General Partner of EIP Associates L.P.

Additionally, there are thousands of individual holders of Beneficial Assignment Certificates ("BACs") which evidence an assignment of limited partnership interests in Polaris Industries Partners L.P. At the Court's request, Petitioners would be willing to make those names available to the Court to further enable members of the Court to evaluate possible recusal.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

No. _____

POLARIS INDUSTRIES PARTNERS L.P., a limited partnership, POLARIS INDUSTRIES L.P., a limited partnership, POLARIS INDUSTRIES ASSOCIATES L.P., a limited partnership, and POLARIS INDUSTRIES CAPITAL CORPORATION, a Delaware corporation,

PETITIONERS,

v.

WESTERN POWER SPORTS, INC., an Idaho corporation,

RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

OPINIONS BELOW

The Memorandum Opinion of the Court of Appeals for the Ninth Circuit, filed December 11, 1991, is unreported pursuant to Ninth Circuit Rule 36-3 and is reprinted in the Petitioners' Appendix ("Pet. App.") at A-1. Only the disposition is contained in a listing at 951 F.2d 365 (9th Cir. 1991) (table). A Petition for Rehearing and a Suggestion for Rehearing En Banc was denied by an Order of the Ninth Circuit dated February 25, 1992. (Pet. App. A-9.) The Federal Court for the District of Idaho's Opinion and Order dated April 3, 1990, granting Petitioners' Motion For Summary Judgment is published at 744 F. Supp. 226 (D. Idaho 1990) and is reprinted at Pet. App. A-12.

JURISDICTIONAL STATEMENT

The Court of Appeals for the Ninth Circuit entered judgment on December 11, 1991. The Ninth Circuit denied a timely petition for rehearing on February 25, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The original jurisdiction of the United States District Court for the District of Idaho was invoked under 28 U.S.C. § 1331 as a civil action arising under the laws of the United States and under 28 U.S.C. § 1332 as a civil action involving citizens of different states.

STATUTES INVOLVED

The statutes involved are Section 1 of the Sherman Act, 15 U.S.C. § 1 (1976) (set out verbatim at Pet. App. A-22), and Section 3 of the Clayton Act, 15 U.S.C. § 14 (1973) (set out verbatim at Pet. App. A-22, 23).

STATEMENT OF THE CASE

A. **The Snowmobile and ATV Markets.** Since 1983, four manufacturers have sold snowmobiles in the United States: The Petitioners, through Polaris Industries L.P., ("Polaris" or "Petitioners" herein), Bombardier, Arctco and Yamaha. Although Arctco left the snowmobile market in the early 1980s, it subsequently reentered. Since its reentry, Arctco has consistently increased its market share.

In 1987 and 1988, Polaris was the only snowmobile manufacturer selling snowmobiles in the lower 48 states through independent distributors, who in turn sold the snowmobiles to retail dealers. The remaining manufacturers sold their snowmobiles directly to retail dealers. Retail sales of snowmobiles are highly influenced by price. Various Polaris distributors testified to the vigorous and intense price competition which always existed in the retail snowmobile market. In 1987 and 1988,

Polaris' share of snowmobiles sold in the United States retail market was approximately 31%.

Until 1985, Polaris sold essentially only snowmobiles and related parts, accessories and clothing. At that time, it joined Honda, Yamaha, Kawasaki and Suzuki as manufacturers who sold ATVs in the United States. In 1985, Respondent Western Power Sports, Inc. ("WPS" or "Respondent") sought to expand its Polaris product line to include ATVs.

B. Respondent's Wholesale Business. WPS has been in the wholesale distribution business since about 1967. Between 1967 and 1988, WPS was a wholesale distributor[1] of numerous products, including Polaris snowmobiles, ATVs and related parts, accessories and clothing; after-market parts from various suppliers for ATVs, snowmobiles and motorcycles; bicycles; mini-motorcycles; camping equipment; string trimmers; boat trailers; chain saws, parts and accessories; numerous golf course accessories; walk-behind mowers; riding mowers; lawn tractors; tillers; edgers; industrial and commercial turf equipment; utility vehicles; and turf vehicles. During the 21 years of its operation, WPS frequently discontinued the wholesaling of certain products and added new products. WPS's president, Mr. James Brandt, testified that the wholesale distribution of snowmobiles, ATVs, lawn mowers, televisions and other products of that nature was very similar. Like WPS, Polaris' other distributors sold wide and diversified product lines, which, in addition to Polaris products, included sound equipment, televisions, furniture, floor covering, boats, motorcycles and generators, snowblowers, lawnmowers, appliances, and heating and air-conditioning equipment.

Within six months after Polaris notified WPS that . . .

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[1] For a three-year period (1985-1988), WPS also sold a wide variety of products as a retailer.

it would not continue as a Polaris distributor, WPS substituted new product lines to distribute at wholesale. It purchased a company called Sierra Motorcycle Products. WPS also entered into another distributor agreement with The Snapper Company (Snapper products include lawn tractors, mowers, tillers and edgers). That agreement allowed WPS to expand its distribution territory of Snapper products.

C. The Polaris-WPS Relationship. The distributor relationship between Polaris and WPS was conducted pursuant to a series of written one-year agreements. Pursuant to those agreements, the distributorship rights expired on March 31 of each year unless Polaris and WPS agreed in writing to a renewal for another one-year period.

In early 1987, Polaris informed WPS that at the end of that contract year -- March 31, 1987 -- it would not renew WPS's ATV and snowmobile distributor agreements for various performance reasons. WPS requested that it be allowed to continue as a distributor of Polaris ATVs and snowmobiles, and, as a condition of the renewal, WPS specifically agreed to certain performance goals, including a purchase goal of 1,310 1988 model Polaris ATVs.

In the 1986-87 season, WPS had sold approximately 825 1987 model Polaris ATVs. In the summer of 1987, Polaris became aware that the ATV industry was experiencing a sales decline. In September 1987, Polaris contacted WPS and asked it to sign an order for 825 1988 Polaris ATVs. Mr. Brandt signed the order on behalf of WPS. Mr. Brandt admits he understood, when he signed the order in the fall of 1987, that if Polaris shipped 825 1988 model ATVs, he was obligated to accept them.

During the subsequent months of November and December 1987 and January 1988, WPS began to realize that dealers were not ordering as many 1988 ATVs as WPS had projected. In March 1988, WPS informed Polaris that

it would not accept delivery of the 825 Polaris ATVs to be delivered pursuant to its order. WPS already had received 295 1988 model ATVs. At that time, Polaris had not yet decided whether it would renew its distributor relationship with WPS for 1988-89. On March 18, 1988, during discussions about WPS's decision not to accept delivery, WPS informed Polaris that it wanted the conditions for a renewal enumerated in writing. Later that day, Polaris sent WPS a letter which stated:

> As a follow up to our telephone conversation today, please be advised that if you take delivery of the 828 unit ATV order, as available from Polaris under cash payment terms, and fulfill the other requirements of the Distributor Agreement including, but not limited to, the 1988/89 snowmobile order, your Snowmobile and ATV Distributor Agreements will be renewed effective 4/1/88.

When WPS refused to provide the requested written acknowledgement to Polaris' letter, Polaris notified WPS that it would not renew the distributor agreements. Polaris did not appoint another distributor. Instead, Polaris subsequently distributed its products directly to retail dealers.

D. Course of Proceedings and Disposition Below.

1. WPS commenced an action in the Federal District Court for the District of Idaho in May 1988, two months after Polaris elected not to renew the parties' one-year distributor agreements for Polaris snowmobiles and ATVs. In its complaint, WPS averred that Polaris illegally tied the

purchase of certain ATVs to the wholesaling of snowmobiles. (Pet. App. A-13, 14.) WPS contended that Polaris' conduct violated Section One of the Sherman Act (First Claim), Section Three of the Clayton Act (Second Claim), Idaho Code § 48-101 (unreasonable restraint of trade) (Third Claim) and Idaho Code § 48-104 (unfair competition) (Fourth Claim). WPS also asserted a common-law claim for "bad-faith" termination (Fifth Claim).[2]

Over a 20-month period, the parties conducted extensive discovery on WPS's claims including voluminous written discovery and 24 depositions. After the completion of discovery, Polaris filed a motion for summary judgment on WPS's First through Fifth Claims. On April 3, 1990, Judge Callister issued a written decision and Order granting Polaris' motion for summary judgment in all respects. (Pet. App. A-12.) The Court entered an Amended Order on April 10, 1990, reaffirming its previous Order and specifying that the entry of judgment was for partial summary judgment, which the District Court certified as final and appealable pursuant to Fed. R. Civ. P. 54(b). (Pet. App. A-20.)

The District Court based its decision to grant Polaris' summary judgment motion on several grounds. First, the District Court rejected WPS's contention, based solely on the proffered opinion of WPS's expert, that the relevant tying product market was limited to the wholesaling of snowmobiles. (Pet. App. A-15-16 n. 2.) The District Court found that the relevant tying product market was the retail snowmobile market. (Pet. App. A-15.) Recognizing that Polaris' 31% retail market share was almost identical to the market share found to be insufficient in Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2 (1984), the District Court held that, as a matter of law,

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[2] In a Supplemental Complaint, WPS asserted an additional claim for an amount allegedly due and owing on its open account with Polaris (Sixth Claim). That claim is still pending and not an issue on appeal.

Polaris lacked market power in the retail market. Id.

Second, the District Court found that on balance WPS had failed to present evidence supporting any unreasonable restriction of competition which would outweigh the pro-competitive effects from Polaris' alleged tying arrangement. (Pet. App. A-17.) An additional basis for summary judgment on WPS's Clayton Act claim was the District Court's conclusion that the "wholesaling" of snowmobiles did not constitute "goods, wares, merchandise, machinery or commodities" as required under Section 3 of the Clayton Act. (Pet. App. A-17, 18.)

2. The Ninth Circuit reversed and remanded for trial. While the District Court rejected WPS's contention that the relevant market was the wholesaling of snowmobiles, the Ninth Circuit concluded that WPS's proffered expert opinion proposing such a relevant market created a factual dispute. Since the definition of the relevant tying product market was disputed, further analysis, at a summary judgment stage, of WPS's antitrust claims was precluded.[3]

The Ninth Circuit nevertheless considered Polaris' statement that the record contained no evidence of any foreclosure of commerce or anti-competitive effect on competition in the tied product market. While the Ninth Circuit identified a perceived inconsistency between portions of this Court's Jefferson Parish decision addressing the necessary effect on commerce in the tied product market, it did not attempt to resolve it. Rather, it concluded (without citation to any evidence) that Polaris could "effectively [preclude] its distributors from entering the wholesale market for ATVs and the market for ATV distributorships." (Pet. App. A-5, A-6.)

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[3] The Ninth Circuit's reasoning with respect to the relevant market definition served as a basis for reversing both the per se and "rule of reason" claims under Section One of the Sherman Act. (Pet. App. A-3, A-6 n.3.)

Finding fact issues as to the relevant market definition and the effect on competition, the Ninth Circuit also reversed summary judgment on WPS's "rule of reason" claim and its Idaho state law antitrust claim. Finally, the Ninth Circuit stated that the Clayton Act does apply to WPS's claim because, although the alleged tying product was the wholesaling of snowmobiles, WPS purchased "goods" (snowmobiles and ATVs) within the meaning of the Clayton Act from Polaris for resale. (Pet. App. A-6, A-7.) As with WPS's claim under the Sherman Act, the Ninth Circuit stated that the genuine issue of material fact regarding the relevant tying product market also prevented summary judgment on the Clayton Act claim. (Pet. App. A-8.)[4] On February 25, 1992, the Ninth Circuit Panel denied Polaris' timely Petition for Rehearing. (Pet. App. A-9.)

ARGUMENT IN SUPPORT OF GRANTING THE PETITION

The basis for WPS's claim against Polaris is its contention that Polaris engaged in an illegal tying arrangement by tying the wholesaling of snowmobiles to the purchase of "unwanted" ATVs which WPS had previously ordered. In reversing the District Court's grant of summary judgment, the Ninth Circuit failed to adopt a "reasonable interchangeability" standard in its review of WPS's proposed relevant tying product market. Instead, it merely accepted a conclusory "expert" statement regarding

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[4] Respondent WPS sought relief under the Sherman Act, and the Clayton Act, and under Idaho's state antitrust statute and related claims under Idaho state law. The District Court's summary judgment order, as revised, disposed of each of these claims based on its finding that the federal antitrust laws had not been violated as a matter of law. After the Ninth Circuit found a genuine issue of material fact on the federal antitrust claims, it did not separately analyze any of the Idaho state law claims, and they are therefore not before this Court.

the relevant tying product market definition. Additionally, on the basis of a perceived ambiguity in Jefferson Parish, the Ninth Circuit speculated about potential effects on competition rather than requiring the non-moving party to submit facts which demonstrated that the alleged tying arrangement had an impact on competition or any anti-competitive effect.

Tying claims under the Sherman Act and the Clayton Act are analyzed both for per se liability and, alternatively, under the rule of reason, for their pro-competitive and anti-competitive effects. To establish a per se tying claim, a plaintiff must present facts showing:

1. An arrangement wherein the seller forces a tie-in between two distinct products or services;

2. Sufficient market power in the tying product market to impose significant restrictions in the tied product market; and

3. An adverse effect on a not insubstantial volume of commerce in the tied product market.

See Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 12-18; Northern Pacific Railway Co. v. United States, 356 U.S. 1, 5-6 (1958). For a tying claim under the "rule of reason," the legality of the challenged conduct "depends on its competitive consequences, not on whether it can be labeled 'tying'" and requires an inquiry into the actual effect of the challenged arrangement on interbrand competition. Jefferson Parish, 466 U.S. at 21 n.34. "Rule of reason" analysis requires a court to review an alleged restraint of trade and determine whether, on balance, the practice promotes or suppresses competition in the relevant

market. National Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Oklahoma, 468 U.S. 85 (1984).[5]

This Court has determined that summary judgment is a legitimate procedure for weeding out cases where a plaintiff cannot establish a factual basis for the material allegations of its complaint. See Celotex Corp. v. Catrett, 477 U.S. 317, 327 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986); Matsushita Elec. Indus. Co. Ltd. v. Zenith Radio Corp., 475 U.S. 574 (1986). In Celotex, the Court stated Rule 56 mandates that after adequate time for discovery, as has been afforded WPS in this action, summary judgement is appropriately granted against a party who fails to establish facts supporting each essential element of its claim. Celotex, 466 U.S. at 322-23.

In Matsushita, this Court held that an antitrust plaintiff (such as WPS) opposing summary judgment carries the burden of setting forth specific facts which "do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita, 475 U.S. at 586. The Court affirmed summary judgment for the defendants, stating that where the factual context of an antitrust claim "renders [the] claim implausible -- if the claim is one that simply makes no economic sense -- [a plaintiff] must come forward with more persuasive evidence than would otherwise be necessary" to successfully oppose summary

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[5] WPS alleges violation of both Section 1 of the Sherman Act and Section 3 of the Clayton Act on the same underlying facts. Despite certain differences in legislative history and policy underlying the two statutes, per se antitrust tying liability depends upon the same analysis. See Jefferson Parish, 466 U.S. at 23 n.39 (citing Times-Picayune Publishing Co. v.United States, 345 U.S. 594, 608-09 (1953)); see also Moore v. Jas. H. Matthews & Co., 550 F.2d 1207, 1214 (9th Cir. 1977) (referring to Fortner Enters. Inc. v. U.S. Steel Corp., 394 U S. 495 (1969)). Accordingly, except for the contention that the Clayton Act does not apply to an intangible service defined as the "wholesaling of snowmobiles" (the alleged tying product), the lower courts applied the same per se standards to WPS's First and Third Claims.

judgment. Matsushita, 475 U.S. at 587 n. 14.[6]

In this case, the Ninth Circuit improperly relieved WPS of its burden to "set forth specific facts showing that there is a genuine issue for trial." See Liberty Lobby, 477 U.S. 242, 256 (1986). The Ninth Circuit held that the parties' purported factual dispute (only created by the submission of "expert" testimony) concerning the scope of the relevant tying product market precluded summary judgment.[7] However, WPS presented an economically implausible theory of the relevant tying market product and failed to submit the "more persuasive evidence" in support of that theory. The record contains no evidence to support a tying product market limited only to the wholesaling of snowmobiles; WPS admitted that the wholesaling of other products such as lawnmowers and televisions was very similar. The Ninth Circuit should have considered such evidence to determine whether the availability of reasonable substitutes, as a matter of law, affected the scope of the market.

Additionally, the Ninth Circuit improperly hypothesized about effects on competition, rather than relying on the record. The record contains no evidence of any substantial potential for impact on competition or any

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[6] The plaintiffs' evidence in Matsushita, like WPS's evidence, consisted merely of an expert's opinion. This Court stated that such an expert's opinion had little probative value compared with actual economic factors. There, the Court found the suggestion that the alleged Japanese conspirators had depressed prices and sold goods at substantial losses was irrational. Matsushita, 475 U.S. at 594 n. 19. See also Town Sound and Custom Tops, Inc. v. Chrysler Motors Corp., 959 F.2d 468, n. 16 (3d Cir. 1992) (citing Fed. R. Civ. P. 56(e) and Lujan v. National Wildlife Federation, ___ U.S. ___, 110 S. Ct. 3177, 3188 (1990)).

[7] By premising each of its rulings on the perceived existence of a factual dispute on the relevant market inquiry, the Ninth Circuit's approach has eviscerated the potential for eliminating meritless, unsupported antitrust tying claims at summary judgment. See Celotex, 427 U.S. at 327.

adverse effect on competition resulting from the alleged tying arrangement. Polaris and WPS simply had a contract dispute regarding a purchase order for ATVs--an order to which WPS initially agreed, but later repudiated after market conditions changed. In situations where a purchaser claims it was forced to buy "unwanted" product without any evidence that it would have bought the "unwanted" product from another seller in the tied product market, a court should be required to reject the tying claim since there can be no adverse impact on competition. See Jefferson Parish, 466 U.S. at 16. The uncontroverted facts demonstrate WPS's complaint arises not from any violation of the antitrust laws, but from a business dispute between a single manufacturer and a distributor of its products.[8] Polaris refused WPS's request to renegotiate an ATV order and, for a number of reasons, decided to discontinue doing business with WPS and instead sell its products directly to retailers.

The Court should grant review and take the opportunity to further define both the evidentiary requirements for antitrust litigants in the federal courts and the permissible economic and legal parameters in which antitrust tying claims can be maintained. The Ninth Circuit's analysis in this case improperly distorts relevant market definition analysis in antitrust tying cases. The Ninth Circuit's departure from binding antitrust precedent in this Court also presents a conflict with other federal circuits and invites unnecessary, expensive antitrust litigation by disappointed businesses on economically implausible theories. See Data General Corp. v. Digidyne Corp., cert. denied, 473 U.S. 908, 909 (1985) (White, J., dissenting) (noting potentially enormous effect of failure to address tying issues raised by Ninth Circuit).

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[8] The specific act of which WPS complains is Polaris' decision not to renew a one-year snowmobile distributor agreement.

I. ON A MOTION FOR SUMMARY JUDGMENT, COURTS MUST CONSIDER UNCONTROVERTED EVIDENCE OF REASONABLE SUBSTITUTES IN CONSIDERING A PLAINTIFF'S RELEVANT MARKET THEORY.

The Ninth Circuit's finding of a factual dispute regarding the relevant tying product market ignores WPS's admissions regarding "reasonable interchangeability" -- that it viewed wholesaling for products such as snowmobiles, ATVs, lawnmowers and televisions as very similar. In the context of WPS's multi-line wholesale business, such alternatives should be critical to the definition of a relevant tying product market. In defining the scope of a relevant market in a merger and acquisition case, this Court previously stated the "reasonable interchangeability of use" for a product must be examined. Brown Shoe Co. v. United States, 370 U.S. 294, 325 (1962). Moreover, the scope of the relevant tying product market should depend on "how far buyers will go to substitute one commodity for another." United States v. Du Pont & Co., 351 U.S. 377, 393 (1956) (in an attempted monopolization case, a single manufacturer's production of cellophane could not constitute the relevant market).

In the context of a relevant product market definition in an antitrust tying case, this Court has held that "any inquiry into the validity of a tying arrangement must focus on the market or markets in which the two products are sold, for that is where the anticompetitive forcing has its impact." Jefferson Parish, 466 U.S. at 18.[9]

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[9] For that reason, the Court's per se tying analysis in Jefferson Parish focused on a tying product market defined as the hospital's sale of anesthesiological services to its patients, rather than its contractual arrangements with providers of anesthesiological services. Id. As with the per se analysis, any inquiry into an alleged illegal tying claim under the rule of reason also must be premised on an acceptable definition of the relevant market. Jefferson Parish, 446 U.S. at 29-30. As the

Like the scope of a relevant market in other antitrust cases, the scope of a relevant market in a tying case also should include reasonable substitutes. Here, the Ninth Circuit however ignored WPS's admission regarding substitutes. Instead, it relied solely on an expert's unsubstantiated statement that the relevant tying product market was the market for the "wholesaling of snowmobiles," without any inquiry into the cross-elasticity of demand, i.e., the existence of reasonable substitutes.[10]

Other circuits, however, have considered reasonable substitutes in their review of plaintiffs' proposed relevant tying product markets. Most recently, the Third Circuit affirmed summary judgment for an automobile manufacturer where audio suppliers alleged illegal tying of the manufacturer's sale of cars to the purchase of the manufacturer's audio systems. Town Sound and Custom Tops, Inc. v. Chrysler Motors Corp., 959 F.2d 468, 1992-1 Trade Cases ¶ 69,773 (3d Cir. March 26, 1992). In Town Sound, the Third Circuit affirmed the district court's

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uncontroverted record and the discussion infra demonstrate, WPS's unduly restrictive proposed tying product market should have been rejected as a matter of law.

[10] Focusing on the products - snowmobiles - the District Court in this case concluded that the retail snowmobile market was the appropriate relevant market. (Pet. App. A-15.) The record contained uncontroverted evidence of the intense price competition in the retail snowmobile market among the four manufacturers' models. Polaris cannot and did not tie any sales on the retail level. There is no evidence in the record that consumers had to buy a Polaris ATV to obtain a Polaris snowmobile. All snowmobile manufacturers distribute their products through intermediate wholesale channels -- distributors and/or dealers. None sell to consumers directly. Accordingly, each manufacturer's retail market share also reflects its percentage of wholesale sales. In the retail market, Polaris had only a 31% market share. By implication, the share of Polaris snowmobiles "wholesaled" could be only 31%. Compare Jefferson Parish, 466 U.S. at 26 (30% market share insufficient to confer market power.)

rejection of a proposed tying product market limited to new Chrysler cars. Id. The Third Circuit considered the defendant's unrebutted evidence of interchangeability among new cars, i.e., Chrysler cars compete against many other companies' automobiles. Id.[11]

Similarly, the Sixth Circuit recently reversed a jury verdict, vacated an injunction and entered judgment n.o.v. for a computer system manufacturer against which computer service organizations had filed a tying claim. Virtual Maintenance, Inc. v. Prime Computer, Inc., 957 F.2d 1318 (6th Cir. February 27, 1992) (reh. denied, April 13, 1992). In Virtual Maintenance, the district court had denied summary judgment for the manufacturer, finding a disputed fact issue regarding the relevant tying product market definition. Virtual Maintenance, 735 F. Supp. 231, 235 (E.D. Mich. 1990). On appeal after a multi-million dollar jury verdict in favor of the plaintiffs on the tying claims, the Sixth Circuit reversed, vacated and remanded with instructions that judgment be entered in favor of the manufacturer. Virtual Maintenance, 957 F.2d at 1330.

Based on the Brown Shoe "reasonable interchangeability" standard, the Sixth Circuit stated:

> The essential test for ascertaining the relevant product market involves the identification of those products or services that are either (1) identical to or (2) available substitutes for the defendant's product or service . . . (citations omitted) . . . Cross-elasticity of supply also helps

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[11] To support its purported tying product market definition, plaintiffs in Town Sound offered a conclusory affidavit from their expert, who merely agreed with plaintiffs' allegations. The Sixth Circuit rejected this conclusory affidavit in affirming summary judgment for Chrysler. Town Sound, 959 F.2d 468, n. 16.

> define a relevant product market. Cross-elasticity of supply is the degree to which producers will enter the market to compete if prices rise (citations omitted).

Virtual Maintenance, 957 F.2d at 1325. The Sixth Circuit concluded that the appropriate tying product market definition was "the sale of software revisions and support for the CAD/CAM industry in general." It rejected the plaintiffs' proposed product market definition limited to the sale of products "necessary to do business with Ford Motor Company," on the grounds that a single customer's preference for a certain manufacturer's brand does not create a separate product market. Virtual Maintenance, 957 F.2d at 1326-27 (citations omitted).[12]

Additionally, the definition of a relevant market should take into consideration the supply side aspects of a proposed market. As the Sixth Circuit has stated, "[T]he relevant product market cannot be determined without considering the cross-elasticity of supply." Virtual Maintenance, 957 F.2d at 1327. See Grappone, Inc. v. Subaru of New England, Inc., 858 F.2d 792, 798 (1st Cir. 1988) (cross-elasticity of supply shown in a market where numerous competitors could and did offer similar dealerships); M. Leff Radio Parts, Inc. v. Mattel, Inc., 706

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[12] Numerous circuits have rejected plaintiffs' proposed relevant market definitions limited to a single manufacturer's products. See Kenworth of Boston, Inc. v. Paccar Financial Corp., 735 F.2d 622, 623-24 (1st Cir. 1984); Kingsport Motors, Inc. v. Chrysler Motors Corp., 644 F.2d 566, 571 (6th Cir. 1981); H.J., Inc. v. International Tel. & Tel. Corp., 867 F.2d 1531, 1538 (8th Cir. 1989) (reh. denied, 876 F.2d 59); Stearns v. Genrad, Inc., 752 F.2d 942, 946-47 (4th Cir. 1984); Spectrofuge Corp. v. Beckman Instruments, Inc., 575 F.2d 256, 282-83 (5th Cir. 1978), cert. denied, 440 U.S. 938 (1979); Tunis Bros. Co., Inc. v. Ford Motor Co., 952 F.2d 715, 724-27 (3d Cir. 1991) (rejecting relevant market definition limited to Ford trucks). But see Parts & Electric Motors, Inc. v. Sterling Electric, Inc., 826 F.2d 712, 720 (7th Cir. 1987) (allowing single manufacturer market for admittedly unique electric motor parts).

F. Supp. 387, 399 (W.D. Pa. 1988) (court rejected distributor's attempt to define relevant market by including manufacturer with whom it had contract but excluding competing manufacturer who had previously turned down plaintiff's request for distributorship; argument ignored reasonable interchangeability standard under Brown Shoe).

A review of the "reasonable interchangeability" on the supply side requires an analysis of any barriers to entry in the proposed market. If a competitor may offer a similar product or service, no barrier to entry should be found. See Virtual Maintenance, 957 F.2d at 1327. A competitor must be unable to offer a similar package; a choice not to do so cannot constitute a barrier. See Spartan Grain & Mill Co. v. Ayers, 735 F.2d 1284, 1287 (11th Cir. 1984), cert. denied, 469 U.S. 1109 (1985).

In the instant case, the Ninth Circuit failed to consider the uncontroverted evidence regarding the reasonable interchangeability on either the demand (product) or the supply (manufacturer) sides. On the demand side, the market in which the alleged tie occurred was the wholesale market. Multi-line distributors, such as WPS, wholesale numerous products. WPS's specific admissions that the wholesaling of snowmobiles, ATVs, lawnmowers, televisions "and other products of this nature . . . is very similar" required a finding, as a matter of law, that the relevant tying product market could not be limited to the "wholesaling of snowmobiles." WPS's president testified that:

> A. Distribution of snowmobiles and ATVs and lawnmowers and other products of this nature in my opinion is very similar. The way to be successful at it is to stay close to dealers, to talk to them, to treat them fairly, to give them a fair profit, as best you can treat them right and give them good

service. We had been doing that for many years in snowmobiles and we said we could do it in ATVs.

Q. Would you have felt the same with respect to the distribution of television sets?

A. Yes.

WPS's business practices confirmed the interchangeability of various products in its wholesale business. Over its twenty years of operation, WPS discontinued the wholesaling of certain products and added new products to its wholesaling business. WPS was a wholesale distributor for a wide range of products including chain saws, mini-motorcycles, camping equipment, golf course accessories, power turf vehicles and turf equipment, lawn mowing and garden equipment, and Polaris snowmobiles and ATVs.[13] After Polaris elected not to continue using WPS as its distributor, WPS acquired the assets of a motorcycle company and expanded its distribution territory of Snapper lawn and garden products.

On the supply side, WPS submitted no evidence that any other snowmobile manufacturer was precluded from using WPS, or any other company, as a wholesaler of their snowmobiles. Rather, each of the other snowmobile manufacturers merely chose not to do so.[14] If Polaris'

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[13] WPS submitted no evidence that Polaris had any power in a market defined to include the wholesaling of various products including snowmobiles, ATVs, lawnmowers, camping equipment, garden equipment, chain saws, televisions, etc.

[14] WPS's tying product market definition is further exposed as economically implausible since under WPS's interpretation of that market--"the wholesaling of snowmobiles"--of which Polaris allegedly had a 100% market share, the "market" ceased to exist after Polaris sold its

decision to use wholesalers conferred "market power" upon it to such an extent that it could force the wholesalers to take "unwanted" ATVs or other "unwanted" products, other snowmobile manufacturers would have changed their distribution channels and also sold their snowmobiles through wholesalers. Additionally, WPS submitted no evidence that any other manufacturer of products of the "nature" of snowmobiles, ATVs, lawnmowers or televisions, could not offer WPS the opportunity to wholesale such a manufacturer's products. Therefore, since the Ninth Circuit should have been required to consider the uncontroverted high cross-elasticity of supply, WPS's proposed market definition of "wholesaling of snowmobiles" should have been rejected as a matter of law. Instead, the Ninth Circuit erroneously accepted WPS's unsupported expert's statement (Pet. App. A-6, n. 3.), without consideration of these necessary factors.

Like the District Court in this case, various federal courts have rejected unsupported economic expert testimony under Fed. R. Evid. 403 and 703 where the theory advanced is implausible and other evidence of record undermines the probative value of the expert's opinion. See Matsushita, 505 F. Supp. 1313, 1356-63 (E.D. Pa. 1980), affirmed, 475 U.S. 578, 594. See also Reazin v. Blue Cross and Blue Shield of Kansas, Inc., 663 F. Supp. 1360, 1478-81 (D. Kan. 1987), affirmed, 899 F.2d 951 (10th Cir.), cert. denied, ___ U.S. ___, 110 S. Ct. 3241 (1990); American Bearing Company, Inc. v. Litton Industries, 540 F. Supp. 1163, 1169-75 (E.D. Pa. 1982), affirmed, 729 F.2d 943 (3d Cir. 1984), cert. denied, 469 U.S. 854 (1984); Baxley-Delamar Monuments v. American Cemetery Ass'n., 938 F.2d 846,

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snowmobiles and ATVs directly to retail dealers. In considering alternative means of distributing its products to consumers, Polaris should not be put at risk of being characterized as an illegal monopolist merely by virtue of its unilateral decision to deal indirectly with retailers through a distributor.

850-51 (8th Cir. 1991) (an expert opinion based on assumption and not on market analysis cannot create a triable issue of fact for the jury). Under Matsushita, WPS had the burden to come forth with specific facts supporting its expert's definition of a very limited tying product market. WPS failed to meet that burden. The Ninth Circuit should have considered WPS's admission regarding the reasonable interchangeability of numerous products in its wholesale business. The Ninth Circuit also should have considered the absence of any barriers to entry into the "wholesaling of snowmobiles." Such a review would have demonstrated that WPS's proposed tying product market made no economic sense.

The most recent federal circuit court decisions, including the present case, Virtual Maintenance, and Town Sound, evidence that guidance is needed to ensure that "reasonable interchangeability" is applied in the context of tying product market definitions. This case presents the opportunity for the Court to establish concise standards for the analysis of proposed tying product markets and the use of summary judgment procedures where market theories are unsubstantiated or inconsistent with economic realities.

II. POLARIS' PURPORTED TYING ARRANGEMENT CREATED NO ANTI-COMPETITIVE EFFECT AND HAD NO SUBSTANTIAL POTENTIAL FOR IMPACT ON COMPETITION IN THE ATV MARKET.

In addition to its acceptance of an unsubstantiated "expert" opinion to find a fact issue on the relevant market definition, the Ninth Circuit speculated about the possible, but unproven, anti-competitive effect or foreclosure of

competition resulting from the alleged tying arrangement.[15] As this Court has stated:

> [N]ot every refusal to sell two products separately can be said to restrain competition. If each of the products may be purchased separately in a competitive market, one seller's decision to sell the two in a single package imposes no unreasonable restraint on either market, particularly if competing suppliers are free to sell either the entire package or its several parts (footnote omitted).

Jefferson Parish, 466 U.S. at 11-12.

"Without a showing of actual adverse effect on competition, [a plaintiff] cannot make out a case under the antitrust laws . . .." Jefferson Parish, 466 U.S. at 31 (discussing rule of reason claim). See also National Collegiate Athletic Ass'n v. Board of Regents, 468 U.S. 85, 104 n.26 (1984) (since a tying arrangement may have pro-competitive justifications, considerable market analysis should be undertaken to review the actual effects of the arrangement). This requirement is nearly indistinguishable from the third element of a per se claim identified earlier in Jefferson Parish. The Court stated:

> [W]hen a purchaser is "forced" to buy a product he would not have otherwise bought even from another seller in the tied-product market, there can be no

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[15] "[B]y forcing its snowmobile distributors to distribute its ATVs, Polaris effectively precluded its distributors from entering the wholesale market for ATVs and the market for ATV distributorships. Though the tying arrangement may also have had pro-competitive effects, we cannot say as a matter of law that these effects outweigh the arrangement's anti-competitive effects." (Pet. App. A-5, A-6.)

> adverse impact on competition because no portion of the market which would otherwise have been available to seller has been foreclosed.

Jefferson Parish, 466 U.S. at 16 (emphasis added). The Court's discussion regarding "no adverse impact" obviously applies to the third element--that the plaintiff submit evidence that the tying arrangement foreclose a not insubstantial volume of commerce.[16]

A plaintiff seeking to establish liability under either the per se test or the "rule of reason" therefore should be required to present evidence that the alleged tying arrangement had some adverse impact on competition in the tied product market.[17] See Cemar, Inc. v. Nissan Motor Corp. U.S.A., 678 F.Supp. 1091 (D. Del. 1988). In Cemar, a federal court dismissed a per se tying claim because the plaintiff dealer could not prove the anti-competitive consequences which that court found were required under Jefferson Parish. Cemar, 678 F. Supp. at 1099. There, the dealer complained it was required to purchaser "unpopular" car models from the defendant manufacturer as a prerequisite for obtaining "popular" vehicles. The dealer admitted it did not want the unpopular models and did not contend that it would have purchased the unpopular vehicles elsewhere. Since no other seller competed with the defendant to sell unpopular

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[16] Rather than analyzing a perceived inconsistency in the Jefferson Parish decision on the plaintiff's burden to establish actual adverse impact on competition, the Ninth Circuit impermissibly speculated about WPS's possible desires to wholesale other manufacturers' ATVs. (Pet. App. A - 4,5.)

[17] As Justice O'Connor has noted, "The 'per se' doctrine in tying cases has thus always required an elaborate inquiry into the economic effects of the tying arrangement (footnote omitted)." Jefferson Parish, 466 U.S. at 34 (O'Connor, J., concurring).

vehicles to the plaintiff dealer, the Cemar court concluded that "the alleged tying agreement could not foreclose competition in the market for unpopular vehicles." Id.

In this case, the record contains no evidence that Polaris prevented WPS or any other distributor from carrying other brands of ATVs or that it forced its snowmobile distributors to carry ATVs. Rather, the uncontroverted facts demonstrate that one of the distributors wholesaled both Kawasaki and Polaris ATVs and that WPS wanted to distribute Polaris ATVs.

This case does not involve antitrust competition issues. It involves a contractual dispute between a manufacturer and its distributor with respect to the quantity of product to be purchased and accepted. In the fall of 1987, WPS signed a purchase order for 825 1988 model ATVs, but admittedly changed its mind about the size of its order after the ATV market conditions subsequently changed.[18] It refused to accept delivery of all 825 ATVs. Like the plaintiff in Cemar, WPS has not alleged or submitted any evidence that it would have purchased the "unwanted" ATVs from another seller. If WPS refused to accept its entire order of Polaris ATVs due to the general conditions in the ATV market, WPS would not have been willing to purchase more ATVs from some other source.[19]

A court also should be required and permitted, on a motion for summary judgment, to balance the pro-competitive and anti-competitive effects in analyzing a rule of reason claim. See Smith Machinery Co., Inc. v. Heston Corp., 878 F.2d 1290, 1296 (10th Cir. 1989) (dismissing

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[18] Polaris' proposed order of 825 1988 ATVs was substantially lower than the original purchase goal, to which WPS admittedly agreed, of 1310 1988 ATVs.

[19] WPS's allegation regarding the quality of Polaris ATVs is irrelevant since no claim was made that Polaris tied products at the retail level.

tying claims after balancing the pro-competitive and anti-competitive effects). As the Tenth Circuit stated, "Common sense informs us that in most cases when, as here, the manufacturer does not prohibit a dealer from carrying competing lines, [a requirement that a dealer carry its full line of products] enhances interbrand competition by making another [product] available to the public." Id.

Here, Polaris submitted evidence which demonstrated the legitimate, pro-competitive effects of the purported tying arrangement. The introduction of Polaris ATV products expanded consumers' choices of available alternatives in the ATV market, and allowed Polaris products to compete with other brands of ATVs.

WPS mistakenly confuses its own disappointment over Polaris' decision not to renew its distributorship with its burden to prove an adverse effect on competition. The goal of antitrust laws is to protect competition, not individual competitors. Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S.477 (1977). Where only a single purchaser, such as WPS, allegedly was forced to purchase a tied item, a finding of any substantial potential for impact on competition should be precluded as a matter of law.

Summary judgment is intended to weed out cases for which plaintiffs cannot present triable issues of fact. As evidenced by this case, guidance is needed on the standards which federal courts should apply in tying cases for the plaintiff's burden to provide evidence of anti-competitive effects or substantial potential for impact on competition in opposing summary judgment motions. Summary judgment standards also should not be disregarded or abandoned in antitrust tying cases merely because the plaintiff proffers "expert" testimony, especially when that testimony rests on unsupported conclusions and contradicts independent undisputed facts undermining the plaintiff's claims.

CONCLUSION

For all the foregoing reasons, the Writ of Certiorari should issue.

Respectfully submitted,

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APPENDIX A

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Western Power Sports, Inc., **No. 90-35359**

Plaintiff-Appellant,

FILED
FEB 25 1992
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

v. **D.C. No. CV-88-1191-MJC**

Polaris Industries Partners L.P.;
Polaris Industries L.P.;
Polaris Industries Associates L.P.;
Polaris Industries Capital
Corporation, **MEMORANDUM***

Defendants-Appellees.

Appeal from the United States District Court
for the District of Idaho
Edward J. Lodge, District Judge, Presiding

Argued and Submitted January 11, 1991
Portland, Oregon

Before: BROWNING, CANBY and TROTT, Circuit Judges.

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*This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

Polaris Industries (Polaris) is a manufacturer of snowmobiles, all-terrain-vehicles (ATVs) and other products. Polaris is the only manufacturer that sells snowmobiles to wholesale distributors; other snowmobile manufacturers sell directly to retailers. Western is a wholesale distributor of snowmobiles and other products. Beginning in the late 1980's, Polaris allegedly required its snowmobile distributors, including Western, to purchase specified quantities of ATVs and terminated the snowmobile distributorship agreements of distributors who failed to purchase their allotment of ATVs.

When the market for ATVs experienced a serious downturn, Western objected to this arrangement. Eventually, Western refused to purchase the allotted number of Polaris ATVs and Polaris terminated its snowmobile distributorship. This suit followed. Western alleges Polaris had imposed an illegal "tying arrangement" in violation of section 1 of the Sherman Act, 15 U.S.C. § 1, section 3 of the Clayton Act, 15 U.S.C. § 14, and Idaho antitrust law. Western also asserts other state law claims. The district court granted summary judgment for Polaris on all claims. We reverse.

To establish a tying arrangement that is illegal per se, the plaintiff must show (1) the tying of two products; (2) defendant had sufficient economic power in the tying product market to affect the tied product market, and (3) an effect on a substantial volume of commerce in the tied product market. Bhan v. NME Hospitals, Inc., 929 F.2d 1404, 1411 (9th Cir. 1991).

A tying arrangement exists when a seller refuses to sell one product (the tying product) unless the purchaser agrees to purchase another product (the tied product). Northern Pacific Railway Co. v. United States, 356 U.S. 1, 5 (1958); Bhan, 929 F.2d at 1411. The district court concluded there was a genuine issue of material fact as to whether a tying arrangement existed. Viewing the evidence in the light most favorable to Western, see Tzung v. State Farm Fire

And Casualty Co., 873 F.2d 1338, 1339-40 (9th Cir. 1989), we reach the same conclusion. Western offered evidence sufficient to permit a trier of fact to decide Polaris had tied sales of the two products -- that is, had required distributors to purchase ATVs in order to obtain snowmobiles -- including a statement by Polaris' director of product development admitting the existence of a tying arrangement.[1]

To determine whether Polaris possessed sufficient power in the snowmobile market to affect commerce in the ATV market, the snowmobile market must first be defined. "Defining the relevant market is a factual inquiry . . . ." Oltz v. St. Peter's Community Hospital, 861 F.2d 1440, 1446 (9th Cir. 1988). Thus, the relevant market may be determined on summary judgment only if there is no genuine issue of material fact on this question. See Bhan, 929 F.2d at 1413 & n.9.

Polaris offered evidence the relevant market was either the retail market for snowmobiles or the market for wholesale distributorships generally. However, Western offered evidence, including the testimony of Professor Whitelaw, sufficient to permit a trier of fact to find the tying product market was the wholesale market for snowmobiles.

Since the relevant market for the tying product was disputed, the district court could not conclude Polaris' power in that market was not sufficient to allow Polaris to affect a substantial volume of commerce in the tied product. If Western's evidence is credited, Polaris had 100% of the tying product market, presumptively sufficient to give Polaris the market power required to establish a per se

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[1]Polaris' contention that the distributorship termination merely reflected Polaris' refusal to acquiesce in Western's attempt to evade its voluntary contractual obligation to purchase the ATVs simply raises a question for the jury. This factual dispute illustrates why the grant of summary judgment was improper.

violation. See Jefferson Parish Hospital Dist. No. 2 v. Hyde, 466 U.S. 2, 16 (1984) (defendant's monopoly of the tying market gives defendant sufficient market power to allow plaintiff to establish a per se violation).[2]

Polaris argues summary judgment was nevertheless appropriate because Western would not have purchased ATVs from any manufacturer if not compelled to purchase them from Polaris. Polaris relies on the following statement in Jefferson Parish:

> [W]hen a purchaser is "forced" to buy a product he would not have otherwise bought even from another seller in the tied-product market, there can be no adverse impact on competition because no portion of the market which would otherwise have been available to other sellers has been foreclosed.

466 U.S. at 16.

If interpreted as Polaris interprets it, this passage would appear to be at odds with another earlier in the Jefferson Parish opinion in which the Court said competition was restrained and the Sherman Act violated when the seller exploited its power over the tying product to force the buyer to purchase a tied product the buyer "either did not want at all, or might have preferred to purchase elsewhere . . . ." 466 U.S. at 12 (emphasis added). But see Wells Real Estate, Inc. v. Greater Lowell Board of Realtors, 850 F.2d 803, 814-15 (1st Cir. 1988) (reconciling the two passages by interpreting the "no adverse impact" passage as applying to plaintiff's showing as to the "not insubstantial" volume of commerce foreclosed by the tie).

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[2]Neither Polaris nor Western challenges the district court's determination that the tying arrangement affected a substantial volume of commerce in ATVs, the tied product.

We need not resolve the ambiguity. The record did not establish the factual predicate for applying the Jefferson Parish statement Polaris relied upon, even read as Polaris would read it. Western offered evidence it was initially enthusiastic about selling Polaris' ATVs and there is no indication Western would have been any less enthusiastic about selling other manufacturers' ATVs. Evidence showed that when the retail ATV market declined, Western objected to Polaris' alleged practice of requiring it to purchase more ATVs than the retail market could bear, but this evidence does not establish Western wished to withdraw from the ATV business altogether. Western offered evidence to the contrary: It did wish to purchase ATVs, but simply not the number of ATVs Polaris demanded.

We conclude Western's claim that it was the victim of a tying arrangement that violated the Sherman Act per se should not have been rejected on motion for summary judgment.

We also conclude summary judgment was improper for Western's claim it was the victim of an unreasonable restraint of trade. Plaintiff may prevail without proof of per se illegality if it can establish the tying arrangement unreasonably restrained trade in the tied product market. See Jefferson Parish, 466 U.S. at 29. The rule of reason analysis requires the fact-finder to "analyze the anti-competitive effects along with any pro-competitive effects to determine whether the [arrangement] is unreasonable on balance." Bhan, 929 F.2d at 1413; see also Arizona v. Maricopa County Medical Society, 457 U.S. 332, 343 (1982). Here, the district court granted Polaris' motion for summary judgment on the ground that the tying arrangement's positive effects on competition outweighed its negative effects.

There were genuine issues of material fact regarding the reasonableness of the tying arrangement. By forcing its snowmobile distributors to distribute its ATVs, Polaris

effectively precluded its distributors from entering the wholesale market for ATVs and the market for ATV distributorships. Though the tying arrangement may also have had pro-competitive effects, we cannot say as a matter of law that these effects outweighed the arrangement's anti-competitive effects.[3]

Similarly, summary judgment must be reversed with respect to Western's claim under Idaho Code § 48-101. The Idaho Supreme Court has recognized that federal decisions interpreting the Sherman Act offer "persuasive guidance" in interpreting and applying Idaho Code § 48-101. Pope v. Intermountain Gas Co., 646 P.2d 988, 994 n.11 (Idaho 1982). The district court granted summary judgment on this claim solely on this ground. Because we reverse the district court's judgment with respect to the Sherman Act claim, we must also reverse the judgment as to the section 48-101 claim.

We also reverse the district court's judgment with respect to the Clayton Act claim. The district court concluded the Clayton Act claim fails because wholesale distributorships are not "goods, wares, merchandise, machinery, supplies or other commodities" within the meaning of section 3 of the Clayton Act, 15 U.S.C. § 14. We disagree. In Chelson v. Oregonian Publishing Co., 715 F.2d 1368 (9th Cir. 1983), a newspaper publishing company allegedly prohibited its retail distributors from distributing advertising inserts for another company. Id. at 1369. We rejected the defendant's claim that the case involved services, not goods, and was therefore outside the scope of section 3, because the agreement between the newspaper company and its distributors provided the distributors would purchase goods (newspapers) from the company and

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[3]Summary judgment of the unreasonable restraint of trade claim was also inappropriate because establishing the relevant market is critical to the rule of reason analysis. Oltz, 861 F.2d at 1446. As we have said, there was a genuine issue of material fact as to the relevant market.

resell them to readers. Id. at 1372. Similarly, Western purchased goods (snowmobiles and ATVs) from Polaris and resold them.

Polaris argues section 3 does not apply because Western never actually purchased any unwanted ATVs. Polaris cites Ron Tonkin Gran Turismo, Inc. v. Fiat Distributors, Inc., 637 F.2d 1376 (9th Cir. 1981), which held section 3 inapplicable when there was no "executed agreement." Id. at 1389. Polaris interprets Ron Tonkin to require an actual payment of money and delivery of goods. However, Ron Tonkin used the term "executed agreement" to distinguish an actual contract from "an offer to enter into an exclusive dealing arrangement." Id. at 1388 (original emphasis). Further, the plain language of section 3 states either a sale or a contract for sale will suffice. 15 U.S.C. § 14 ("It shall be unlawful . . . to lease or make a sale or contract for sale of goods . . . on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods of a competitor . . . of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition . . .") (emphasis added).

Western offered evidence it reluctantly executed a purchase order for 825 Polaris model ATVs in September 1987 in order to keep its snowmobile distributorship. That purchase order is sufficient to invoke section 3. See Smith Machinery Co. v. Hesston Corp., 878 F.2d 1290, 1298-99 (10th Cir. 1989) (citing Ron Tonkin for proposition section 3 requires a contract for sale and stating a purchase order would have constituted such a contract).

The district court held that even if section 3 applied, Western failed to establish the effect of the tie-in "may be to substantially lessen competition," relying on Moore v. Jas. H. Matthews & Co., 550 F.2d 1207, 1214 (9th Cir. 1977). Moore held "this standard is met either if the seller enjoys sufficient economic power in the tying product market to appreciably restrain competition in the tied

product market or if a not insubstantial volume of commerce in the tied product market is restrained." Id. As we have said, there was a genuine issue of material fact as to the relevant tying product market and no challenge by either party to the district court's finding that the tying arrangement affected a substantial volume of commerce in the ATVs.

Western also alleges Polaris violated Idaho Code § 48-104 (intentionally driving another out of business) and the covenant of good faith and fair dealing implicit in contracts under Idaho law. The district court ruled against Western on these claims only because it ruled against Western on the tying issues. Accordingly, these claims too will be open on remand.

REVERSED and REMANDED.

APPENDIX B

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Western Power Sports, Inc., **No. 90-35359**

Plaintiff-Appellant,

FILED
FEB 25 1992
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

v. **D.C. No. CV-88-1191-MJC**

Polaris Industries Partners L.P.;
Polaris Industries L.P.;
Polaris Industries Associates L.P.;
Polaris Industries Capital
Corporation, **ORDER**

Defendants-Appellees.

Before: BROWNING, CANBY and TROTT, Circuit Judges.

The panel has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

Western Power Sports, Inc.,
an Idaho corporation,

Plaintiff, **Civil No. 88-1191**

-vs-

Polaris Industries Partners L.P., a limited partnership, Polaris Industries L.P., a limited partnership, Polaris Industries Associates L.P., a limited partnership, and Polaris Industries Capital Corporation, **ORDER**

Defendants.

The Court has before it the motion for summary judgment filed by defendant Polaris. In accordance with the views expressed in the memorandum decision accompanying this order,

NOW, THEREFORE, IT IS HEREBY ORDERED that defendant's motion for summary judgment be, and the same is hereby, GRANTED.

IT IS FURTHER ORDERED that the above-entitled matter be, and the same is hereby, DISMISSED, in its entirety.

IT IS FURTHER ORDERED that each party shall bear their own costs.

DATED this 4th day of April, 1990.

/S/
MARION J. CALLISTER
SENIOR UNITED STATES DISTRICT JUDGE

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF IDAHO

Western Power Sports, Inc., an Idaho corporation,

Plaintiff,

Civil No. 88-1191

v.

Polaris Industries Partners L.P., a limited partnership, Polaris Industries L.P., a limited partnership, Polaris Industries Associates L.P., a limited partnership, and Polaris Industries Capital Corporation,

MEMORANDUM DECISION

Defendants.

The Court has before it the motion for summary judgment filed by defendant Polaris Industries (Polaris). In reviewing this motion for summary judgment the Court must determine whether there exist any genuine issues of material fact. Fed.R.Civ.P. 56(c). The Court heard oral arguments on March 21, 1990, has reviewed the entire matter, and is prepared to submit its written findings.

The above-entitled matter originated when Polaris discontinued using Western Power Sports (WPS) as its distributor for Polaris snowmobiles and all-terrain vehicles (ATVs). WPS began selling Polaris snowmobiles in 1961 and sold them continuously, with the exception of one year, up until 1988. In 1985 Polaris, in order to keep its manufacturing plants in operation all year round, entered into the ATV market. Polaris used its current snowmobile

dealers to distribute the ATVs. In fact, the snowmobile agreement and the ATV agreement were separate and distinct from each other and ran for a period of one year expiring on March 31st of each year unless renewed. Each year Polaris would approach WPS and attempt to find out how many snowmobiles and ATVs the distributor would be able to sell. Snowmobile purchase orders were executed in March of each year and ATV orders were executed in the fall. In September of 1987 WPS, reluctantly, agreed to sign an order with Polaris for 825 1988 model Polaris ATVs. Around this same time the ATV market was becoming depressed due to national safety concerns. Due to the depressed market, WPS attempted to negotiate a reduction in the number of ATVs that it had contracted to purchase for the prior year. Eventually, Polaris refused to reduce the number and in March 1988 WPS told Polaris that it would not accept delivery of the 825 ATVs it had previously ordered. Shortly thereafter Polaris notified WPS on March 21, 1988, that it would not renew the ATV distributorship agreement or the snowmobile distributorship agreement. Polaris maintains that the reason the snowmobile distributorship agreement was not renewed is due to bad sales performance on the part of WPS.

WPS filed this lawsuit on the underlying basis that the snowmobile distributorship agreement was not renewed because of the problems with the acceptance of the ATVs under the ATV distributorship agreement. Plaintiff maintains that such a relationship involves unlawful tying in violation of the Sherman and Clayton Acts. The complaint alleges five causes of action: (1) violation of section 1 of the Sherman Act due to unlawful tying; (2) violation of section 3 of the Clayton Act due to unlawful tying; (3) violation of Idaho Code § 48-101 due to unlawful tying; (4) violation of Idaho Code § 48-104 where Polaris' cancelling of the agreements was for the purpose of driving the plaintiff out of the snowmobile business; and

(5) commission of a malicious and tortious bad faith breach of an express or an implied covenant in the agreements. The Court will address each of these causes of action in turn.

The Court will first address plaintiff's alleged violation of section 1 of the Sherman Act and Idaho's state form thereof under Idaho Code § 48-101.[1] Section 1 of the Sherman Act, 15 U.S.C.S. § 1, provides in part:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal . . .
>
> .

In order to establish a per se tying arrangement in violation of section 1 of the Sherman Act, the plaintiff must demonstrate the existence of three elements: (1) a tie-in between two distinct products or services; (2) sufficient economic power in the tying product market to impose significant restrictions in the tied product market; and (3) an effect on the non-insubstantial volume of commerce in the tied product market. Mozart Co. v. Mercedes-Benz, 833 F.2d 1342, 1345 (9th Cir. 1987), cert. denied, 109 S.Ct. 179 (1988). As for the first element, the Court is convinced that there are two distinct products involved. The defendant, in its attempt to persuade the Court otherwise, maintains there is only one product, that being the Polaris franchise. The Court cannot accept defendant's position and there were separate and distinct agreements for the snowmobile distributorship as well as the ATV

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[1]The Idaho Supreme Court has recognized that federal decisions offer persuasive guidance in interpreting and applying § 48-101. Since § 48-101 is patterned after section 1 of the Sherman Act, the Court will analyze such in light of analogous federal decision. See Pope v. Intermountain Gas Co., 103 Idaho 217, 223, 646 P.2d 988, 994 (1982).

distributorship. The second part of the first element is that there must be a tie-in between the two products. The question of fact on this issue has been established by the letter from Polaris to WPS dated March 18, 1988 (Exhibit 14 attached to the Appendix and Memorandum of Law in Support of Motion for Summary Judgment filed January 31, 1990).

The second element the Court must review is whether there was sufficient economic power in the snowmobile agreement market to impose significant restrictions in the ATV agreement market. In reviewing whether or not there are genuine issues of material fact as to this issue, the Court must first determine what the relevant market is. The plaintiff maintains that the relevant market is the market for the wholesaling of snowmobiles and ATVs, which, since Polaris is the only snowmobile manufacturer using distributors, gives them a 100% share of the market. The defendant on the other hand argues persuasively, and the Court adopts the position that the relevant market is the retail snowmobile market. See Mozart Co., 833 F.2d at 1346-47.

In reviewing whether or not there was sufficient economic power here, it was helpful to look at the percentage of the market the parties had. This is exactly what the United States Supreme Court did in Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 46 U.S. 2 (1984). In Jefferson Parish the Court held that 30% of the market was insufficient to meet the requirements of the second element for a per se tying arrangement. It appears here that Polaris had approximately 31% of the market in the retail snowmobile industry. Given the United States Supreme Court's findings, this Court holds that as a matter of law such a percentage of the market share does not constitute sufficient market power over the tying product. See

Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2 (1984).[2]

The third factor needed in order to find a per se tying violation is an effect on a non-insubstantial volume of commerce in the ATV product market. In determining this amount, the United States Supreme Court has stated that it should entail all sales covered by tying arrangements. Fortner Enters. Inc. v. U.S. Steel Corp., 394 U.S. 495, 502 (1969). In Fortner, the United States Supreme Court found that $200,000.00 was a substantial sum. In this case, although not precisely known, it appears that the amounts are much greater than $200,000.00. Overall, the Court does believe that plaintiff did meet the third element of the per se test.

In determining whether a per se tying arrangement is present, courts look to see whether or not force has been used. In Jefferson Parish, the United States Supreme Court stated:

> [W]hen a purchaser is "forced" to buy a product he would not have otherwise bought even from another seller in the tied product market, there can be no adverse impact on competition because no portion of the market which would otherwise have been available to other sellers has been foreclosed.

Jefferson Parish, 466 U.S. at 16. Here, since WPS could not have bought from another manufacturer, there is no adverse impact on competition. Plaintiff has stretched the use of the term "force." It is uncontradicted that WPS

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[2]Plaintiff has brought to the Court's attention the testimony of Dr. Edward Whitelaw as to his expert opinion concerning the relevant product market. The Court has reviewed the expert's testimony but finds that as a matter of law the relevant market is the retail snowmobile market.

fiercely sought the ATV distributorship agreement and was awarded such. Likewise, it signed the sales contract ordering the 825 ATVs. Furthermore, cases cited by plaintiff stand for the proposition that the purchasers did not want the product at all and did not distinguish where a purchaser only wanted certain amounts of the product. Here, plaintiff was willing to accept 500 ATVs but did not want to accept the additional 325. Taken as a whole, the Court is unable to find force on the part of Polaris.

In order to prevail in the absence of a per se liability, plaintiff must demonstrate that the violation unreasonably restrained competition. Jefferson Parish, 466 U.S. at 29. It was interesting to note that although the courts recognize this as the "rule of reason," no cases have been found that have awarded the plaintiff a victory after a "rule of reason" analysis. After reviewing the record the Court is unable to find, even assuming a tie-in occurred, that such a tie-in unreasonably restrained the competition. This Court will not condemn the alleged tie-in as it finds its anti-competitive impact is outweighed by its contribution to efficiency, where it was efficient, at least at that time, for Polaris to distribute the ATVs through its snowmobile distributors.

In sum, the Court finds as a matter of law that the plaintiff has not demonstrated sufficient economic power on the part of the snowmobile product market to impose significant restrictions in the ATV product market by Polaris. In addition, it has also failed to demonstrate that the defendant unreasonably restrained competition. Given the Court's finding as to this issue, the Court is required to dismiss counts one and three.

The second count goes to the alleged violation of section 3 of the Clayton Act which also involves tying. To prevail on a Clayton Act section 3 theory, the plaintiff must show that the tie-in products are "goods, wares, merchandise, machinery, supplies, or other commodities." 15 U.S.C.S. § 14. The defendant maintains that the distributorship

agreements relating to Polaris products were not goods, wares, merchandise, machinery or commodities and therefore section 3 is not applicable. The Court agrees with the defendant's position since the basis of the underlying lawsuit centers around two separate distributorship agreements. Cf. Waldo v. North American Van Lines, Inc., 669 F. Supp. 722 (W.D. Pa. 1987).

Originally, there were practical differences between a section 3 and a section 1 theory. However, as the Ninth Circuit Court of Appeals pointed out, the United States Supreme Court's analysis has suggested that the standards are virtually identical. Moore v. Jas. H. Matthews & Co., 550 F.2d 1207, 1214 (9th Cir. 1977), referring to Fortner Enters. Inc. v. U.S. Steel Corp., 394 U.S. 495 (1969). Under a section 3 theory, the plaintiff must establish that the effect of the tie-in "may be to substantially lessen competition." Moore, 550 F.2d at 1214. In addition, courts have held that forcing a dealer to accept a full line of products in order to retain a dealership violates anti-trust laws only if the effect of such forcing was to lessen substantially competition in any line of the commerce. Pitchford v. Pepi, Inc., 531 F.2d 92 (3rd Cir. 1975), cert. denied, 426 U.S. 935 (1976). Here, the plaintiff did not demonstrate that the effect of the alleged tie-in substantially lessened competition and in its own review of the documents, the Court was also unable to find any evidence indicating this restriction of competition.

In sum, the Court finds that section 3 of the Clayton Act does not apply, and even if it did, the plaintiff would fail to meet the specific requirements. This requires the Court to dismiss count two of the complaint.

At the hearing on the motion for summary judgment, the plaintiff conceded that if defendant prevailed on the summary judgment motion as to the tying issues, remaining counts four and five would also fail. Since this Court finds that counts one, two and three fail, it will also dismiss counts four and five.

DATED this 4th day of April, 1990.

/S/

MARION J. CALLISTER
SENIOR UNITED STATES DISTRICT JUDGE

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF IDAHO

Western Power Sports, Inc., an Idaho corporation,

Plaintiff, **Civil No. 88-1191**

-vs-

Polaris Industries Partners L.P., a limited partnership, Polaris Industries L.P., a limited partnership, Polaris Industries Associates L.P., a limited partnership, and Polaris Industries Capital Corporation, **AMENDED ORDER**

Defendants.

In an order filed April 3, 1990, the Court granted defendant's motion for summary judgment and ordered that the above-entitled matter be dismissed in its entirety. After such time the Court has learned that in a supplemental complaint the plaintiffs sought recover under an additional cause of action. Thus the Court will amend its prior order dismissing counts one through five.

Plaintiffs have also requested that since the main portion of the complaint has been dismissed that the Court may direct that the Court certify this order as a final judgment under Fed.R.Civ.P. 54. The Court has reviewed this matter and finds that there is no just reason for delay and will therefore certify this as a final judgment whereupon an appeal may lie.

Finding good cause therefor,

NOW, THEREFORE, IT IS HEREBY ORDERED that the Court's order filed April 3, 1990, be, and the same is hereby, AMENDED, to indicate that the above-entitled matter be, and the same is hereby, not dismissed in its entirety.

IT IS FURTHER ORDERED that counts one through five of the complaint be, and the same are hereby, DISMISSED.

IT IS FURTHER ORDERED that upon motion of the plaintiff the Court certifies this as a final judgment from which an appeal may be taken.

DATED this 10th day of April, 1990.

/S/
MARION J. CALLISTER
SENIOR UNITED STATES DISTRICT JUDGE

APPENDIX F

Statutes Involved:

Sherman Act § 1 (15 U.S.C. § 1):

§ 1. Trusts, etc., in restraint of trade illegal; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years or by said punishments, in the discretion of the court.

(As amended Dec. 21, 1974, Pub.L. 93-528, § 3, 88 Stat. 1708; Dec. 12, 1975, Pub.L. 94-145, § 2, 89 Stat. 801.)

Clayton Act § 3 (15 U.S.C. § 14):

§ 14. Sale, etc., on agreement not to use goods of competitor

It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities, whether patented or unpatented, for

use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce.

(Oct. 5, 1914, c. 323, § 3, 38 Stat. 731.)

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

Western Power Sports, Inc., an Idaho corporation,

Plaintiff, **Civil No. 88-1191**

-vs-

Polaris Industries Partners L.P., a limited partnership, and Polaris Industries L.P., a limited partnership, Polaris Industries Associates L.P., a limited partnership, and Polaris Industries Capital Corporation,

Defendants.

DEPOSITION OF W. EDWARD WHITELAW, PhD
TAKEN ON BEHALF OF THE DEFENDANTS
AT BOISE, IDAHO
JANUARY 15, 1990

APPEARANCES

MESSRS. HOWARD HUMPHREY and RORY R. JONES, Attorneys at Law, of the firm of Clemons, Cosho & Humphrey, 815 West Washington Street, Boise, Idaho, 83702, appearing for and on behalf of the Plaintiff.

MS. ANNAMARIE A. DALEY, Attorney at Law, of the firm of Robins, Kaplan, Miller & Ciresi, 1800 International

Centre, 900 Second Avenue South, Minneapolis, Minnesota 55402, appearing for and on behalf of the Defendants.

ALSO PRESENT: JAMES BRANDT; LOWELL BASSETT

REPORTED BY:

SHERI D. LUDIKER, C.S.R., R.P.R.
Notary Public

[Excerpts beginning at p. 59]

[p. 59]

Q And what in specifics to the extent you recall did you discuss?

A Well, maybe I can facilitate this. I cannot remember -- I could not repeat right now a single interrogatory that we addressed last August. Generally -- so, I don't know if we have them here, but that would be one way of recalling what the substance of the conversations would have been.

Q Exhibit No. 1 advises you that the law firm of Clemons, Cosho expects to interrogate you on the question of from a market standpoint, are snowmobiles a different product from ATV's and if so, why? Have you reached a conclusion on that question?

A Yes.

Q And what is your conclusion?

A They are different.

Q From a market standpoint snowmobiles are a different product from ATV's?

A Yes.

Q And why are they different?

A Snowmobiles and ATV's can be bought and sold without reference to one another by [p. 60] either buyers or sellers. They are in separate and independent markets, which is another way of stating they can be bought and sold without reference to one another.

Q You say from a market standpoint snowmobiles are different from ATVs. What do you mean by the phrase "from a market standpoint"?

A Well, I suspect from other standpoints one could argue that they are either more similar or more dissimilar to the statement from an economic standpoint.

Q Well, the statement is you had testified, I thought, from a market standpoint.

A Market standpoint or economic standpoint.

Q What do you mean, then, from a market standpoint?

A To say that snowmobiles and ATV's are different products, at least for an economist, this economist anyway, must be discussed in

the context of a market or a market perspective must be used. And by "market" I simply mean a system of transactions.

Q And when you say "for this economist," you [p. 61] were pointing to yourself; correct?

A This economist, Ed.

Q Ed Whitelaw?

A Ed Whitelaw.

Q Again, the phrase "from a market standpoint" --

A Well, I -- is there more to that question? I'm having difficulty responding. I don't -- there are perhaps any number of other standpoints: physics, religious, cosmic. In this case we want to pin it down some. This whole discussion makes little sense if it isn't tied in some way to a discussion of market forces, demand and supply, buyers and sellers.

Q Are you talking about a specific market when you say from a market standpoint?

A Well, yes, there is a specific market I have in mind.

Q And which market is that?

A The relevant market from my standpoint is the wholesaling of snowmobiles in the five-state region that Western Power sports sold snowmobiles in and bought wholesale

snowmobiles in during the relevant period [p. 62] of time.

Q So, when you say from a market standpoint snowmobiles are a different product from ATV's, the market that you're referring to in the phrase "from a market standpoint" is the market of wholesaling of snowmobiles in the five-state region in which Western Power Sports sold snowmobiles and bought snowmobiles?

A Right.

Q You used the phrase, then, "during the relevant time."

A Well, the period of '85 to '88. The relevant -- the markets upstream from the retail level are driven by the retail level, that is what the consumers do or feel about the products. So, ATV's and snowmobiles, if they are different at the retail level, if consumers can separate them in their minds and do separate them in their minds, then that has implications for markets upstream, further up in the hierarchy.

Q So, if I understand you correctly, what you're saying is that if ATV's and [p. 63] snowmobiles are different at the retail level in the consumers mind, then the wholesaling of snowmobiles--

A That has that kind of implication. But it is also true from my standpoint in my opinion that snowmobiles and ATV's can be bought

and sold without reference to one another at the wholesale level as well. And if that's true, then they are not substitutes. They are independent products.

Q And that conclusion is based upon the assumption that ATV's and snowmobiles are different at the retail level in the consumers' minds?

A In part on that observation, yes.

MS. DALEY: Let's just break for a second.

(Whereupon, a discussion was held off the record.)

MS. DALEY: Let's go on the record here. Mr. Whitelaw's deposition was noticed pursuant to a notice of taking deposition --

MR. HUMPHREY: That's all in the . . .

* * * *

[p. 67]

A I have not brought all of those notes with me.

Q Mr. Whitelaw, you've been asked by the lawyers from Clemons, Cosho to respond to this question: "Based upon the information or assumptions provided to you, did Polaris have sufficient market power in the relevant snowmobile market by which it could impose burdensome terms upon the purchases thereof,

such as forcing purchasers also to purchase ATV's?"

A Yes.

Q Do you have an answer or response to that question?

A Yes.

Q What is your answer?

A Polaris had sufficient market power to do those things.

Q What information was provided to you?

A Two things. One, what we were provided were assumptions of behavior of the tying, that is the condition imposed by Polaris for distributors to buy ATV's if they wanted to buy and sell snowmobiles.

Q So, you were asked in connection with your [p. 68] assignment to assume that Polaris conditioned the purchase of snowmobiles on ATV's?

A That's correct. And then based on that assumption, does that demonstrate sufficient market power to do it? And the answer is, of course, yes.

Then what we've also done is read depositions of several individuals. We've not completed all that reading. But of several individuals that

seemed to support or verify that assumption, lend support to that assumption.

Q Which depositions have you read that seemed to have lent support to that conclusion?

A We've read -- here are the ones I've read: Hall Wendel, Nelson, Nygaard, Eaton, Masek, Jones, and glanced at a letter or memo alleged to have been written and distributed by Wendel. Those are the things that I've looked at to this point.

Q Have you been asked to draw any conclusion from your review of those depositions and that letter or memo relating to question No. 2 on Exhibit No. 1?

[p. 69]

A Try the question again.

Q Have you been asked for any opinion as a result of your review of the deposition transcripts you just identified and the letter or memo in relationship to the question No. 2?

A Well, yes. Appreciate I'm not -- I haven't been asked to demonstrate that the tie took place, the alleged tie took place.

Q So, you're assuming the tie?

A I'm assuming the tie and working from there. There's another element relating to the market power sufficient to impose these terms, which another approach is to infer such market

power from the share of the market, the relevant market enjoyed by Polaris.

If one examines that market, Western Power had nowhere else to turn for access to the relevant market, to the wholesaling of snowmobiles. By implication, therefore, Polaris enjoys a 100 percent market share in the relevant market.

Q And the relevant market is what?

A The wholesaling of snowmobiles, the buying [p. 70] and selling -- access to the buying and selling of wholesale snowmobiles.

Q So, the reference to relevant snowmobile market in question No. 2 refers to the market of wholesaling of snowmobiles?

A Correct.

Q And no other relevant market?

A Correct.

Q Any other information that you based your answer to question No. 2 on other than what you've already testified?

A The ability of Polaris to take similar actions in other similar markets in the country supplements the market power enjoyed and exercised in the relevant market.

Q The relevant market of wholesaling of snowmobiles that you referred to in connection

with your answer to question No. 2 is confined by what geographic boundaries?

A As I said before, the five-state region corresponding to Western Power's distribution area during the relevant time period.

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